84-735

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOUSE OF PRIME RIB,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari

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QUESTIONS PRESENTED

The questions presented by this petition for writ of certiorari are:

1. Whether a district court in a Title VII disparate treatment discrimination case can award back pay to three rejected job applicants without making a finding that the applicants would have been hired but for the discrimination.
2. Whether a district court in a Title VII disparate treatment discrimination case can award back pay to three rejected job applicants beyond the date on which the applicants' union took control of the employer's hiring procedure.

PARTIES

An addition to those parties listed in the caption to the case, the following listed parties have an interest in the outcome of this case:

1. Jeffrey Smith, David Larkin and Charles Lee are the claimants on whose behalf the respondent/plaintiff brought this action;
2. Louis Bulasky is the president and sole shareholder of Van Ness Restaurants, Inc., a corporation doing business as petitioner/defendant House of Prime Rib.

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The opinion of the Court of Appeals is reproduced as Appendix A.

The judgment of the District Court is reproduced as Appendix B.

The Findings of Fact and Conclusions of Law of the District Court are reproduced as Appendix C.

The Stipulation to Correction of Finding of Fact is reproduced as Appendix D.

The judgment of the Court of Appeals is reproduced as Appendix E.

The order on rehearing of the Court of Appeals is reproduced as Appendix F.

JURISDICTIONAL STATEMENT

On May 14, 1984, the Court of Appeals for the Ninth Circuit entered its judgment affirming the April 26, 1983 judgment of the Northern District of California in favor of respondent Equal Employment Opportunity Commission (hereinafter "Commission"). Petitioner House of Prime Rib (hereinafter "HPR") thereafter filed a petition for rehearing which was denied by the Ninth Circuit on July 9, 1984.

Petitioner believes that 28 U.S.C. § 2101(c) and U.S. Sup. Ct. Rule 17, 28 U.S.C. confer jurisdiction on this Court to review the decree by writ of certiorari because a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter, and has decided an important question of federal law which has not been, but should be, settled by this Court.

STATUTORY PROVISIONS

This case involves the back pay provisions of Title VII contained in 42 U.S.C. § 2000e - 5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

1. *Basis for Federal Jurisdiction*

By its complaint filed April 1, 1981, plaintiff/respondent Equal Employment Opportunity Commission sought judgment for damages and an injunction against defendant/petitioner House of Prime Rib for the latter's alleged discriminatory practice in hiring bartenders from June, 1979 to the date of the complaint. The District Court properly assumed jurisdiction pur-

suant to Section 706(f) (1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et.seq. (hereinafter "Title VII"). At trial, the Commission narrowed its focus and attempted simply to establish a case of disparate treatment resulting from HPR's failure to hire any one of three black applicants for a bartending position in June, 1979.

2. *Disposition of the Case Below*

Trial commenced in the United States District Court for the Northern District of California before the Honorable William A. Ingram on November 18, 1982. On April 14, 1983, Judge Ingram filed his Findings of Fact and Conclusions of Law. (Hereinafter "Findings").

The District Court concluded that the Commission had carried its burden of persuading the Court that the black applicants had been the victims of intentional discrimination. (Findings p. 7). An injunction against HPR was decreed, along with an award of back pay, determined by subtracting the interim earnings of the applicant who earned the least from the total amount earned by a bartender employed by Petitioner from June, 1979 to April, 1983. (Findings pp. 8-10).

The District Court entered its judgment on April 26, 1983, permanently enjoining Petitioner from engaging in hiring or recruitment practices that operate to exclude blacks and awarding back pay damages in the amount of $61,057.00. (Judgment pp. 1-2)

On May 6, 1983, HPR filed a Motion for New Trial, and applied for a Stay of Execution. The District Court, on May 12, 1983, entered its Order Staying Execution until ten days after the determination of Petitioner's Motion for New Trial. Thereafter, on June 24, 1983, the District Court denied Petitioner's Motion for New Trial.

Petitioner filed its Notice of Appeal on July 5, 1983. An Order Approving Bond on Appeal and Staying Execution of Judgment was entered on July 16, 1983.

On August 18, 1983, Petitioner delivered to the clerk of the United States District Court a cashier's check in the amount of $74,939.00, constituting a supersedeas bond pursuant to Federal Rule of Civil Procedure 62(d).

The United States Court of Appeals for the Ninth Circuit, by Circuit Judges Wisdom, Anderson and Schroeder, affirmed the District Court judgment on May 14, 1984. In a memorandum opinion, the Ninth Circuit determined that the District Court's finding of discrimination was amply supported by the record, that plaintiffs were not additionally required to show that they were better qualified than persons eventually hired, and that plaintiffs had attempted mitigation of damages. (Memorandum, pp. 1-2).

Petitioner filed a Petition for Rehearing on May 29, 1984, which was denied on July 9, 1984. The Mandate of the United States Court of Appeals for the Ninth Circuit was filed in the United States District Court for the Northern District of California on July 19, 1984.

3. *Statement of Facts*

Petitioner House of Prime Rib is a long-established, high quality San Francisco restaurant. In June, 1979, a bartending position opened at HPR and its Assistant Manager, Gus Stathis, contacted Local 2 of the Hotel and Restaurant Employees and Bartenders' Union (hereinafter "Union") to obtain referrals of bartending applicants. At that time, the Union was required by a consent decree entered in the cases of *Mills & EEOC* v. *Bartenders International Union, et al.* to dispatch 25% black bartenders to employers who requested applicants from the Union.

On June 12 & 13, 1979, the Union dispatched two white bartending applicants, neither of whom was hired. Thereafter a black applicant, David Larkin, was dispatched to HPR. Although Mr. Larkin testified he attached his resume to a job application, Mr. Stathis did not recall seeing this resume. Mr. Larkin testified that he was told to return the next day and when he did so, he was told the position was filled. The dispatcher later informed Mr. Larkin the position was still open, but he refused to return for an interview and was not hired.

A second black applicant, Charles Lee, was then dispatched to HPR. Mr. Lee filled out an application form which indicated he had left his most recent job due to "personal problems." Mr. Lee was not hired.

Jeffrey Smith, also a black applicant, was dispatched to HPR

on the same day as Mr. Lee. Mr. Smith listed his work experience on the application, indicating a position at the Stadium Club. Mr. Stathis questioned him as to another Stadium Club employee and the length of time he had worked there, a period of several months. At the bottom of Mr. Smith's application, Mr. Stathis noted: "Color. Very pleasant, I will hire him." Upon reviewing the application, however, Mr. Stathis decided not to hire him.

Mr. Stathis thereafter contacted a former HPR bartender who recommended a friend of his, Duane Eldredge, for the bartending position. Mr. Eldredge had worked for six years as a bartender at the Holiday Lodge across the street from HPR, and had worked seventeen months at the Yerba Buena Hotel, which Mr. Stathis believed was the Buena Vista, a well-known San Francisco establishment. Mr. Stathis decided to hire Mr. Eldredge on June 22, and sent him to the Union to receive a work slip, which he obtained on June 25, 1979.

When HPR needed replacement bartenders in July and August, 1979, Mr. Stathis followed the same procedure: he obtained a referral from an employee, interviewed the applicant, and then sent him to the Union for a work slip. No one at the Union objected to this method of hiring until January, 1980, when the Union's Affirmative Action Officer, Louis Edwards, ordered HPR to remove a newly hired bartender, Clayborn Newsom, and replace him with a white applicant, Sydney Yanoff. Although under the consent decree a black applicant should have been sent, Mr. Yanoff was dispatched simply because, according to Mr. Edwards, he was unable to reach a black applicant by telephone.

Mr. Edwards dispatched Mr. Yanoff rather than Mr. Larkin, Mr. Lee or Mr. Smith (hereinafter "claimants") despite his knowledge that the Union had filed a discrimination claim with the Commission on behalf of the claimants. Mr. Edwards, in fact, had signed the claim form on behalf of the Union on January 17, 1980, the day before he dispatched Mr. Yanoff. Mr. Yanoff could not handle the job and Mr. Edwards again failed to dispatch one of the claimants to HPR. Instead, he ordered Mr. Newsom to be returned to the position. Although Mr. Edwards contended he first dispatched a black applicant, the Union's

dispatch record did not support his contention.

One of the claimants, Mr. Smith, was hired by Mr. Stathis and HPR on a trial basis. Mr. Stathis testified that all bartenders were initially hired on a trial basis, and after such a period, it was determined that Mr. Smith was too slow for the job.

Both Mr. Stathis and Louis Bulasky, HPR's owner, testified as to the need for a bartender of demonstrated stability and experience at HPR. Mr. Stathis testified that he had not interviewed Mr. Larkin nor seen his application, that he did not consider Mr. Lee due to the "personal problems" indicated on his application, and that though Mr. Smith presented a very good appearance, his application did not demonstrate stability or experience in the appropriate establishments. He also testified Mr. Smith would not have been hired on the basis of his temporary experience.

At the trial, a former employee who later worked for the Union accused Mr. Stathis of telling him not to send any "niggers" to HPR when he went to work for the Union. The employee admitted he had nothing to do with sending bartenders to HPR, and Mr. Stathis vehemently denied the charge.

HPR admitted at the trial that none of the 30 persons employed as bartenders from July, 1965 to January, 1980 was black, but explained that most of those bartenders were temporary, that no black had ever applied, and that the Union had never referred a black applicant. During that period, HPR understood that it could hire its bartenders through referrals from employees, or referrals from the former Union president, under the terms of the collective bargaining agreement then in effect.

ARGUMENT

1. THE AWARD OF BACK PAY GRANTED BY THE DISTRICT COURT AND AFFIRMED BY THE APPELLATE COURT CONFLICTS WITH THE STANDARD SET OUT BY OTHER COURTS OF APPEAL AND THEREFORE MUST BE REVERSED OR REMANDED.

A. *Jurisdiction of Supreme Court*

U.S. Supreme Court Rule 17, 28 U.S.C. sets out the considerations governing the discretionary review of this Court on writ of certiorari and provides that a writ of certiorari may be granted:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . .

The decision of the Appellate Court herein conflicts not only with the settled standard of the law enunciated in several other circuit courts, but also ignores a standard the Ninth Circuit itself has consistently applied.

Specifically, the Appellate Court upheld the District Court's award of back pay to respondent's claimants under Title VII, 42 U.S.C. Section 2000e-5(g) (1976), even though HPR had proven by clear and convincing evidence that the Commission's claimants would not have been hired in the absence of discrimination by petitioner. *Muntin v. State of California Parks and Recreation Dep rtment*, 671 F.2d 360, 363 (9th Cir. 1982).

Despite HPR's attempts to focus the Appellate Court's attention on this matter both on the main appeal and in the petition for rehearing, the Court completely ignored the issue. (Memorandum, pp. 1-2.)

The Appellate Court therefore compounded the error first committed by the District Court, which had failed to make a finding as to whether the claimants would have been hired but for the discrimination and, in a separate finding, indirectly implied it would have found in HPR's favor on this issue. (Findings, pp. 5, 9)

This failure on both the trial and appellate level is the ap-

parent result of a conflict between the Ninth and District of Columbia Circuits regarding the requisite findings in a disparate treatment discrimination case in which an award of back pay is sought. Although the District of Columbia clearly requires a finding that a claimant would have gotten the job if he had not been the victim of discrimination, *Day v. Mathews*, 530, F.2d 1083, 1084-85 (D.C. Cir. 1976), the Ninth Circuit in its published opinions has never determined whether such a finding is necessary. *League of United Latin American Citizens v. City of Salinas Fire Department*, 654 F.2d 557, 558 (9th Cir. 1981). The Ninth Circuit's rule ignores the standards governing required findings of fact and results in cases such as the instant one in which it is at best unclear what the District Court's finding would be on the issue.

In a case decided since the appellate decision herein, a separate panel of the Ninth Circuit has remanded a case so that the district court can specifically find whether a candidate for police officer would have been hired in the absence of proven discrimination. *City and County of San Francisco v. Police Department of the City and County of San Francisco*, — F.2d — (1984) Nos. 82-4580, 83-2091, and 83-2108. This petition should be granted to provide trial courts with sufficient guidance in reaching decisions on the important question of the award of back pay, a question which has not been, but should be, settled by this Court.

B. *Objectives of Title VII*

Title VII itself makes it clear that back pay relief is available only where the employee would have received the position had he not been the victim of discrimination. Title VII. 42 U.S.C. § 2000 e-5(g) (1976) provides in relevant part:

> No order of the Court shall require the . . . payment . . . of any back pay, if [the] individual was refused employment . . . for *any reason* other than discrimination. (emphasis added.)

This Court has also stated that the purpose of the back pay provision of Title VII, Section 706(g) of 42 U.S.C. § 2000 e-5(g) is to make the plaintiff whole; that is, to restore the plaintiff to the position he would have occupied but for the discrimination.

Albermarle Paper Company v. Moody, 422 U.S. 405, 421 (1975).

Although the decision to grant an award of back pay and the amount of that award, are within the discretion of the District Court, *Sangster v. United Airlines, Inc.*, 633 F.2d 864, 867 (9th Cir. 190) *cert denied* 451 U.S. 971 (1981); that discretion cannot be exercised without regard to the overriding principles of Title VII. As this Court recently explained:

> "back pay is not an automatic or mandatory remedy [,] ... it is one which the courts 'may' invoke" in the exercise of their sound "discretion [which] is equitable in nature." .. . Nonetheless, while "the power to award back pay is a discretionary power," . . . a "court may exercise this power 'in light of the large objectives of the Act,'" and, in doing so, must be guided by "meaningful standards" enforced by "thorough appellate review." ... Moreover, ... in Title VII cases, "such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' . . ."
>
> *Ford Motor Company* v. *EEOC*, 73 L.Ed 2d 721, 729-30 (1982)

Unless a job applicant would have been hired in the absence of discrimination, an award of back pay is inappropriate, because the applicant is receiving pay for a job he never would have performed. *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976). The employer must be allowed to show that the same employment decision would have occurred even absent discrimination, or the unsuccessful applicant who receives back pay would be placed in a *better* position than if no discrimination had occurred. *Toney v. Block,* 705 F.2d 1364, 1373 (D.C. Cir. 1983) (concurring opinion).

The Ninth Circuit Court of Appeals has held in a variety of situations that back pay can be ordered only when the plaintiff would have been hired "but for" discrimination by the employer; a showing of non-qualification bars such relief. See, e.g., *Kauffman v. Sidereal Corp.*, 695 F.2d 343 (9th Cir. 1982) (retaliatory discharge); *Hung Ping Wang v. Hoffman* 694 F.2d 1146

(9th Cir. 1982) (promotion decision); *Muntin v. State of California Parks and Recreation Dept.*, 671 F.2d 360 (9th Cir. 1982) (hiring decision); *League of United Latin American Citizens v. City of Salinas Fire Department*, 654 F.2d 557 (9th Cir. 1981) (promotion decision).

This is the settled rule among the other circuit courts as well. See, e.g., *Patterson v. Greenwood School District 50* 696 F.2d 293 (4th Cir. 1982); *Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976); *King v. Laborers Int'l Union Local No. 818*, 443 F.2d 273 (6th Cir. 1971).

Therefore, even if intentional discrimination is shown, a claimant is not automatically entitled to an award of back pay:

> Under Title VII, the question of appropriate remedy is distinct from the question whether there was intentional discrimination. For instance, the law does not contemplate an award of back pay to a plaintiff who, though qualified, would not have been hired or promoted even in the absence of the proven discrimination.
>
> *Muntin v. State of California Parks and Recreation Department*, 671 F2.d 360, 363 (9th Cir. 1982).

The testimony of the employer in *Muntin* established discriminatory intent as a matter of law, and the Court ruled that since no explanation of the failure to hire could rebut that testimony there was no need even to consider other reasons for the failure in deciding whether a Title VII violation had occurred. *Id.* Those reasons were, however:

> relevant on the issue of appropriate remedy even though they cannot rebut the proof of discrimination. *Id.*

In order to avoid back pay liability, the employer must show by clear and convincing evidence that the applicant would not have been hired even in the absence of discrimination. *Marotta v. Usery*, 629 F.2d 615, 618 (9th Cir. 1980).

Monetary relief must be denied if the applicant would not have been hired, even where race is an admitted factor in the decision. *Rogers v. EEOC*, 551 F.2d 456, 4517 (D.C. Cir. 1977).

C. *Inadequate Finding of Fact*

The District Court did not make, and the Appellate Court did not require, a finding that the claimants herein would have been hired but for discrimination.

The District Court found merely that:

> . . . absent discrimination each one of the black bartenders *could* have been hired to fill HPR's June, 1979 vacancy.
>
> (Findings p. 9) (emphasis added)

In so finding, the District Court adopted verbatim one of the Commission's Proposed Findings of Fact and Conclusions of Law, a practice followed throughout most of the Court's Findings. Significantly, however, the District Court rejected the Commission's proposed finding that the claimants:

> were each as qualified to be hired by HPR as a bartender as [those hired].

Instead, the District Court merely found that the claimants were "qualified to be hired bartenders." (Findings p. 5). This singular departure from the Commission's proposed findings strongly implies that the District Court was not convinced that the claimants were as qualified as those actually hired. The Commission must prove its claimants were minimally qualified for the position in order to establish its prima facie case, *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973), so the finding made was a prerequisite for requiring HPR to even articulate a nondiscriminatory reason for the rejection. *Id.* See also *Muntin*, 671 F.2d at 363. If the claimants were not as qualified as those actually hired, their rejection was not discriminatory but rather due to a "relative lack of qualifications." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

Findings of fact promulgated under Federal Rule of Civil Procedure 52(a) should be:

> explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision . . . If the findings fail to provide such an understanding and a factual basis for the

conclusion, the appellate court may appropriately vacate the judgment and remand the cause for supplemental findings of fact.

Alpha Distributing Company of Californic, Inc., v. Jack Daniel Distillery, et al. 454 F.2d 442, 453 (9th Cir. 1972), cert. denied 419 U.S. 842 (1973).

Particularly close scrutiny must be paid to the Findings of Fact and Conclusions of Law of the District Court in this case because, as stated, they were adopted almost verbatim from the Plaintiff's Proposed Findings of Fact and Conclusions of Law submitted before trial by the Commission:

> Certainly the fact that the trial judge has adopted proposed findings does not, by itself, warrant reversal. But it does raise the possibility that there was insufficient independent evaluation of the evidence, and may cause the losing party to believe his position has not been given the consideration it deserves. These concerns have caused us to call for more careful scrutiny of adopted findings.
>
> *Photo Electronics Corp. v. England,* 581 F.2d 772, 777 (9th Cir. 1978).

Neither the District nor Appellate Court herein determined whether respondent's claimants would have been hired absent discrimination. This Court recently stated that when an appellate court determines that a factual issue not resolved below is material to the outcome of the case before it, the "usual rule" is that there should be a remand for further proceedings to permit the trial court to make the missing findings. *Pullman-Standard v. Swint,* 456 U.S. 273, 291 (1982). An appellate court may make an appropriate finding in the first instance, however, where a thorough review of the record permits only one resolution of the factual issue. *Id.* Such was the case in *Patterson v. Greenwood School District 50,* 696 F.2d 293, 295 (4th Cir. 1982), which held an award was not warranted because the Appellate Court found that four of five interviewers would have selected an applicant other than plaintiff even absent discrimination, and the other applicants were at least as qualified as plaintiff.

In *Rogers v. EEOC*, 551 F.2d 256 (D.C. Dir. 1977), where the selection officer and the district court found plaintiff was not the best qualified applicant for the position, the appellate court reversed the award of back pay to plaintiff, though race had been one factor in the decision not to appoint the plaintiff.

In the case at bar, petitioner clearly established that none of respondent's three claimants would have been hired in the absence of discrimination.

1. Jeffrey Smith — both Mr. Stathis and Mr. Bulasky testified at trial that they required stability in a bartender, a quality lacking from Mr. Smith's application. Mr. Stathis further testified that a bartender is on trial for the initial period of his employment and has to work quickly and efficiently. If he does not, then he does not receive a steady job. Mr. Smith did work on a trial basis for HPR after June of 1979, and held a lengthy conversation with a friend of his while waitresses waited for drinks, stayed only in one small section of the bar, and did not help to wash glasses or make drinks for people at other areas of the bar. Mr. Stathis was of the opinion that Mr. Smith was not fast enough to be a bartender at HPR, and so did not hire him for the position. Mr. Bulasky agreed with Mr. Stathis's assessment. Mr. Smith testified that HPR had an unusually low tipping practice, and that he found Mr. Stathis' scrutiny during the trial evening objectionable, so it is unlikely he would have been satisfied with the job.

2. Charles Lee — Mr. Lee's application indicated that he had resigned his last job for personal problems. Mr. Stathis testified that he eliminated Mr. Lee's application based on the statement of personal problems, because he did not want to deal with those problems. There was nothing further in Mr. Lee's application that was attractive to Mr. Stathis in terms of hiring. Despite extensive discovery, the Commission was unable to present any evidence that Mr. Stathis ever hired a white bartender with "personal problems."

3. David Larkin — Mr. Larkin testified that the dispatcher at the Union advised him to return to HPR because the job had not been filled. At that time, June 18, 1979, the bartender position was in fact still open, and Mr. Larkin may have been hired

had he applied. Since Mr. Larkin did not apply when the job was open, he obviously could not have gotten the job. Mr. Stathis testified that he did not see Mr. Larkin or his resume. Therefore, he could not have hired Mr. Larkin unless Mr. Larkin returned, which he failed to do.

None of the above testimony was in any way rebutted by the Respondent, despite its extensive discovery.

Petitioner established at trial that it hired bartenders who met its qualifications, not simply the first bartender who applied. The District Court's findings that each of the bartenders "could" have been hired was clearly erroneous and therefore must be reversed.

Even if this Court determines that the District Court's finding that each of the bartenders "could" have been hired is supported by the evidence, it must remand this issue to the Appellate Court because the finding is insufficient in any case to support an award of back pay.

As set out above, the question of whether or not respondent's claimants are entitled to back pay is whether any of the claimants *would* have been hired in the absence of discrimination. *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976) (per curium). Unless a job applicant would have been hired in the absence of discrimination an award of back pay is inappropriate because the applicant is receiving pay for a job he never would have performed. (*Id.*)

Even if respondent's claimants *could* conceivably have been hired in the absence of discrimination, there can be no doubt that they would not have been hired unless they were at least as qualified as those actually hired. Since the District Court failed to make such a finding, this Court must at least reverse the award of back pay and remand for further findings on the issue of whether the claimants would have been hired. *Day*, 530 F.2d at 1085.

The employer, on remand, must prove by clear and convicing evidence that, in light of the enumerated qualifications, claimant would not have been entitled to the job even if there had been no discrimination, that is, the employer must show the person actually hired was on the whole better qualified for the job.

Cooper v. Allen 467 F.2d 836, 840 (5th Cir. 1972).

2. THE AWARD OF BACK PAY GRANTED BY THE DISTRICT COURT AND AFFIRMED BY THE APPELLATE COURT MUST BE REDUCED.

A. *Standard of Review*

In determining whether the amount of the back pay award should be reduced, this Court should adopt the same standard of review discussed at length above. The District Court's award must be reduced if it conflicts with the "make whole" purpose of Title VII's back pay provision. *Ford Motor Company* v. *EEOC*, 73 L.Ed.2d 721, 730 (1982).

B. *Back Pay Tolled by Union's Control of Hiring*

Abundant evidence was introduced at the trial of this matter showing that as of January, 1980, the Union had taken over complete control of the hiring of HPR's bartenders. Mr. Louis Edwards, the Affirmative Action Officer of the Union, ordered Mr. Stathis to remove a bartender that had been previously hired. Thereafter, he sent a second bartender to HPR. This bartender was white. Mr. Edwards further testified that pursuant to the *Mills* consent decree he was obligated to follow a set procedure in dispatching new bartenders to avoid discrimination. At the time the HPR bartender was removed, it was a black bartender's turn to be dispatched, but Mr. Edwards claimed he was unable to contact a black bartender at the time. Therefore, the Union, in compliance with the *Mills* consent decree, failed to send one of the three claimants, or for that matter any black applicant, to HPR in mid-January, 1980 while simultaneously filing a discrimination claim against HPR. Thereafter, on January 22, 1980 Mr. Edwards sent the original bartender back to HPR and ordered him to be re-employed, 5 days after he had signed the claim form filed by the Union on behalf of the claimants.

The Union's control of hiring effectively tolled the accumulation of back pay:

> The Company would have violated the collective bargaining agreement had it given Rose a job on October 30, and it would have done so at the expense of another employee. If what the Company did was required by the

> contract, and if the contract itself is not discriminatory, the Company could not have discriminated against Rose no matter what its subjective motivation.
>
> *Rose v. Bridgeport Brass Company*, 487 F.2d 804, 810 (7th Cir. 1973)

At the trial of this matter, the respondent did not attempt to prove that the *Mills* consent decree was in any way discriminatory. The decree, in fact, is unlike a standard collective bargaining agreement, in that it has been judicially sanctioned as non-discriminatory. Under the terms of the decree, the Union is required to follow steps that will insure that a representative number of minority bartenders are dispatched to the area's employers, and petitioner was obligated to accede to the Union's practices.

This case is therefore distinguishable from *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982), *mod. and reh. denied* 28 FEP 1820, *cert denied* 74 L. Ed.2d 283, which properly rejected the contention that *any* actions taken by an employer pursuant to a Union contract should be deemed non-discriminatory. *Id.* at 926. As the court there held, a union contract that allows the employer to discriminate will not in any way immunize the employer from discrimination claims. *Id.* The court also determined that a failure by the claimant to assert a cause of action against the union would not necessarily provide a defense to the employer:

> Nor do we understand appellants to have conceded that actions taken pursuant to union contracts were non-discriminatory. The appellants merely asserted that they had not sued the unions because the unions were willing to voluntarily change any practices found to violate Title VII.
>
> *Id.*, at 926 n. 5.

In the case at bar the Respondent has not, of course, asserted a cause of action against the Union. The Commission could not do so, because it was the Union which initially filed the claim of discrimination with the respondent. In fact, the same Mr. Edwards who dispatched the white bartenders also signed the dis-

crimination claim on behalf of the Union with respondent. The Union therefore was not simply an unnamed party, but was actually the original complainant in this action. Williams was a private action pursued by the actual claimant. 665 F.2d at 922.

The Union herein was in the enviable position of increasing the potential back pay award for its members by simply failing or refusing to dispatch them to HPR. Mr. Edwards was aware of the discrimination claim against HPR when he dispatched the white bartender to HPR rather than one of the claimants, but he did so despite that knowledge, and despite the fact that a black bartender *should* have been dispatched at that time. Mr. Edwards therefore manipulated the hiring procedure to assure that back pay would continue to accumulate.

Respondent cannot rely on the well-known principle that a company's later changes in its policies do not absolve it of continuing responsibility for back pay. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 341-42 (1977). Petitioner is not contending that its later hiring of other black bartenders ended its obligation. Petitioner has raised no contention here that such changes in policy in any way affect its back pay obligation.

Instead, petitioner contends that allowing its back pay obligation to mount even after the complaining Union has taken control of the hiring process was an abuse of discretion by the District Court, because it did not coincide with the "large objectives" of Title VII. *Ford Motor Company v. EEOC*, 73 L.Ed.2d 721, 730 (1982).

Ford Motor found that the large objectives of Title VII are to end discrimination, and so far as possible, make the victims of such discrimination whole. *Id.*, at 723. The Court found that an employer's offer of employment effectively tolled the accumulation of back pay, even though the offer did not include a lump sum payment of back pay, or seniority rights. *Id.*, at 737. Claimants are not entitled to back pay once the economic ill effects caused by the employer's prior refusal have ceased:

> As in the case of a claimant who lands a better job, therefore, requiring a defendant to provide what amounts

> to a form of unemployment insurance to claimants, after they have found identical jobs and refused the defendant's unconditional job offer, would be, absent special circumstances, to grant them something more than compensation for their injuries.
>
> *Id.*, at 735

The respondent in this case is requiring HPR to offer a similar type of unemployment insurance. Once the discrimination has occurred, the respondent's argument goes, the employer is responsible for all back pay, regardless of whether the employer would be in a position to hire the previously rejected claimant and so end that back pay. *Id.*, at 733.

The back pay provisions of Title VII were "expressly modeled" on those contained in the National Labor Relations Act, 29 U.S.C. § 160(c), and therefore principles developed under the NLRA will guide, though they do not bind, courts in fashioning Title VII remedies. *Ford Motor Company* v. *EEOC*, 73 L.Ed.2d 721, 729 n. 8 (1972). In the very recent NLRA case of *Bowen* v. *United States Postal Service*, 74 L.Ed.2d 402 (1983), this Court held a union responsible for its wrongful failure to pursue a grievance filed by its member against the employer. Had the grievance been pursued, the employee's back pay liability would have ended much earlier. The union was therefore liable for the increase in damages resulting from its failure.

> It would be . . . unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct. It is true that the employer discharged the employee wrongfully and remains liable for the employee's back pay, . . . The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages. . . Just as a nonorganized employer may accept an employee's waiver of any challenge to his discharge as a final resolution of the matter, so should an

> organized employer be able to rely on a comparable waiver by the employee's exclusive representative.
>
> There is no unfairness to the union in this approach. By seeking and acquiring the exclusive right and power to speak for a group of employees, the union assumes a corresponding duty to discharge that responsibility faithfully — a duty which it owes to the employees whom it represents and on which the employer with whom it bargains may rely. When the union, as the exclusive agent of the employee, waives arbitration or fails to seek review of an adverse decision, the employer should be in substantially the same position as if the employee had had the right to act on his own behalf and had done so.
>
> *Id.* at 413-15

In *Bowen*, the union was guilty of a breach of its duty of fair representation and so it was proper that the employer remained secondarily liable for the entire back pay. *Id.* at 413 n. 12. In this case, however, the Union cannot be accused of any breach of duty to the claimants: Mr. Edwards filed the discrimination claim on behalf of the claimants while insuring that any back pay award would continue to increase. Under the clear holding of *Rose v. Bridgeport Brass Company*, 487 F.2d 804 (7th Cir. 1973) petitioner could not be charged with discrimination after the date upon which the Union took control of the hiring process. Therefore, under *Ford Motor*, petitioner's obligation for back pay should have been tolled as of that date.

C. *Failure to Mitigate*

> As a broad proposition, injured parties are expected to mitigate the damage they suffered. This notion is expressed in Title VII in the following language: "*Interim earnings or amounts earnable with reasonable diligence* by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. Section 2000C-5 (g) (emphasis added) . . .
>
> [C]ourts have long held that back pay is not to be awarded when the evidence shows a willful loss of earnings.

Sangster v. United Airlines Inc., 633 F.2d 864, 867-68 (9th Cir. 1980), *cert denied* 451 U.S. 971 (1981).

As *Sangster* holds, when an injured party fails to mitigate damages, denial of back pay under the circumstances does not frustrate Title VII's remedial purposes. *Id.* at 868. This Court reached the same conclusion in *Ford Motor Company v. EEOC*, 73 L.Ed.2d 721 (1982). In both cases, the claimants did not avail themselves of a reasonable opportunity to minimize the damages accruing by accepting or, in *Sangster*, even pursuing new employment.

In this case, the claimants' mitigation efforts are inextricably bound with those of the Union. Respondent produced evidence that the claimants had been dispatched by the Union to various potential employers in order to prove that the claimant had attempted to mitigate their damages. The Union brought the original complaint with respondent, while at the same time insuring that damages in this case would not be mitigated by refusing to send any of the three claimants to HPR. In the total absence of any evidence that the complaining Union took any steps to mitigate petitioner's damages, this Court should terminate the accumulation of back pay as of the date on which the Union took control of hiring. *DeLorean Cadillac, Inc. v. N.L.R.B.*, 614 F.2d 554, 555 (6th Cir. 1980).

This is not a case such as *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982) *mod. and reh. denied* 28 FEP 1820, *cert. denied* 74 L.Ed.2d 283, in which individual plaintiffs brought suit on behalf of themselves and others similarly situated in order to recover for past discrimination. In such a case, it is proper to hold that an employer may not escape liability because a separate agreement reached with the claimant's Union allowed such discrimination, even though the Union was not named a party defendant. *Id.* at 926. The claimants in the instant case have not pursued their own individual remedy, but have simply provided evidence of claims first brought by the Union itself. In this instance, the Union is a party to the action and the claimants cannot complain that the entity pursuing their cause has in some manner "bargained away" their rights. *Id.*

CONCLUSION

In recent years, this Court has moved to limit awards of back pay in Title VII cases on the grounds that an employer should not be required to "provide what amounts to a form of unemployment insurance to claimants." *Ford Motor Company v. EEOC*, 73 L.Ed.2d 721, 735 (1982).

This Court should not require petitioner to provide such insurance to claimants who were proven to be less qualified than the bartenders actually hired by HPR. This Court should reverse the back pay award or, at a minimum, reduce it by the amount accruing since the Union assumed hiring control.

Dated: October 9, 1984

CHARLES O. MORGAN, JR.
Attorney for Petitioner
House of Prime Rib

Appendix A

Filed — May 14 - 1984
U.S. Court of Appeals

PHILLIP B. WINBERRY, Clerk

In the United States Court of Appeals
for the Ninth Circuit

Equal Employment
Opportunity Commission,
Plaintiff-Appellee,

v.

House of Prime Rib,
Defendant-Appellant.

No. 83-2155
D.C. # CV-81-1366-WAI
MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding
Argued and submitted April 13, 1984

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Before: WISDOM,** ANDERSON, and SCHROEDER, Circuit Judges.

The two issues in the case relate to the district court's finding of intentional discrimination against the three plaintiffs on account of race, and the amount of damages awarded.

The district court's finding of intentional discrimination is amply supported by the record, including, but not limited to, the evidence referred to in the district court's finding number 14. In view of the finding of intentional discrimination on the basis of race, plaintiffs were not additionally required to show that they were better qualified than persons eventually hired. *See Muntin v. California Parks and Recreation Department*, 671 F.2d 360, 362 (9th Cir. 1982). This is not a situation in which the employer compared the legitimate qualifications of a pool of applicants and selected the better qualified. *Compare Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1275-76 (9th Cir. 1981); *Frausto v. Legal Aid Society of San Diego, Inc.* 563 F.2d 1324, 1328 (9th Cir. 1977).

Appellant's position with respect to damages is, in essence, that it was the union's conduct, and not its own, that prevented plaintiffs' hiring during the period for which back pay damages were awarded. The evidence in the record, showing that the appellant could have requested the union to refer any of the plaintiffs, is to the contrary. The district court found that the plaintiffs adequately had attempted mitigation of damages, and that finding is not clearly erroneous.

Affirmed.

** Honorable John Minor Wisdom, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Appendix B

Filed — April 26 - 1983
U.S. District Court — Northern District of California
WILLIAM L. WHITTAKER, Clerk

In the United States District Court
for the Northern District of California

Equal Employment
Opportunity Commission,

Plaintiff,

v.

House of Prime Rib,

Defendant.

No. C-81-1366-WAI

JUDGMENT

This action came on for trial before the Court, the Honorable William A. Ingram presiding. The issues having been duly tried, and Findings of Fact and Conclusions of Law having been duly rendered on April 14, 1983,

It is hereby ORDERED and ADJUDGED:

1. Plaintiff, the Equal Employment Opportunity Commission, shall recover from defendant, House of Prime Rib, the sum of $61,057.00. This sum shall be payable in three separate checks made payable to the following persons in the following amounts:

David Larkin	-	$15,569.54
Charles Lee	-	$21,369.95
Jeffrey C. Smith	-	$24,117.51

Payment shall be made within 10 days of entry of this final judgment by delivering the three checks to counsel for plaintiff. Statements shall be provided with each check as to any deductions made pursuant to State or Federal law, but no such deductions may be made with respect to that part of each check allocated to benefits. Defendant shall make all benefits contributions required by State and Federal law.

2. Defendant, House of Prime Rib, its officers, agents, employers, successors, assigns and all persons in active concert or participation with it are hereby enjoined from engaging in any hiring and/or recruiting practices that exclude, or operate to exclude, blacks from employment opportunities.

3. Plaintiff, the Equal Rights Opportunity Commission, shall recover its costs in this action by presenting a Bill of Costs to the Clerk of the Court.

Dated:

WILLIAM A. INGRAM
United States District Judge

Appendix C

Filed — April 11 - 1983
U.S. District Court — Northern District of California
WILLIAM L. WHITTAKER, Clerk

In the United States District Court
for the Northern District of California

Equal Employment
Opportunity Commission,

Plaintiff,

v.

House of Prime Rib,

Defendant.

No. C-81-1366-WAI

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

I. *Findings of Fact*

1. Plaintiff is the Equal Employment Opportunity Commission ("EEOC") an agency of the United States.

2. Defendant is Van Ness Restaurants, Inc., dba House of Prime Rib ("HPR").

3. This action was instituted on April 1, 1981, pursuant to Section 706(f) (1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C., Section 2000e *et seq.* ("Title VII").

4. Defendant is an employer within the meaning of Section 701(b) of Title VII.,

5. Defendant, House of Prime Rib, is a long established San Francisco restaurant. The president of its parent corporation is Louis Bulasky. Gus Stathis is the assistant manager who hires and supervises employees and acts as Maitre d'. John Satoca

works as accountant-controller.

6. It is undisputed that between July, 1965, and January, 1980, when HPR was informed that EEOC proceedings had begun, the restaurant employed at least 30 persons as bartenders, none of whom was black.

7. Between January, 1975, and January, 1980, Gus Stathis hired no blacks for HPR's "front of the house" positions such as bartender, waitress or busboy. Lavelle Burton, a black woman who has been HPR's cashier since 1973, was hired by Stathis' predecessor.

8. Hiring procedures for HPR have at all relevant times been governed by a collective bargaining agreement with Local 2, Hotel, Restaurant Employees & Bartenders Union ("the Union"). Under the collective bargaining agreement, HPR is required to notify the Union of any vacancy for bartender jobs and to consider all applicants referred by the Union. The collective bargaining agreement provides that only "if the Union is not able to provide competent help suitable for the position to be filled" may the employer hire persons not referred by the Union.

9. During the time period at issue here, the Union was required, by the terms of a consent decree, to ensure that 25% of the bartenders it dispatched were black.

10. In 1979, a white bartender named Todd Mapes quit HPR, effective Sunday, June 17, 1979, after giving two weeks' notice that he was taking new employment.

11. On June 11, 1979, Gus Stathis telephoned the Union to request referrals of bartenders to replace Todd Mapes.

12. Mrs. Norma Medaglia, union dispatcher, dispatched five persons to HPR. On June 14, 1979, she dispatched David Larkin, a black man. On June 18, 1979, she referred Charles Lee and Jeffrey Smith, both black men. She did not exhaust her list of bartenders available for referral, but she was not contacted by HPR for any further referrals.

13. David Larkin went to HPR on June 14, 1979. He asked for and obtained an application, to which he attached his resume. The man he spoke to told him that the man who did the hiring was not there, and that he should return the next day. He returned the next day, June 15, and the same person told him that the bartender's job had already been filled. Mr. Larkin had

substantial experience as a bartender.

14. On Sunday, June 17, 1979, Gus Stathis had dinner with Todd Mapes. They discussed Mapes' new employment, which was with the Union. Stathis told Mapes: "when you go to the Union, don't you send any niggers down here to fill your job."

15. On June 18, 1979, Charles Lee was dispatched to HPR where he obtained an application from Gus Stathis and filled out the application. Stathis asked him no questions about himself or his experience. Lee had substantial experience as a bartender.

16. On June 18, 1979, Jeffrey Smith was dispatched to HPR where he obtained an application from Gus Stathis and filled it out. Stathis asked Smith only if he knew the manager of the bar that Smith had listed as his then-current employer. On the bottom of Smith's application Stathis wrote: "COLOR. VERY PLEASANT, I WILL HIRE HIM." Smith had substantial experience as a bartender.

17. On June 19, 1979, Gus Stathis telephoned Duane Eldredge, a white bartender who was recommended to Stathis by Neil Clayton, a former HPR bartender who was also white. Stathis asked Eldredge to fill out an application and to start work on June 22, 1979. Eldredge did begin work on June 22, 1982. He did not obtain a dispatch slip from the Union until June 25, 1979. Stathis did not inquire about Eldredge's experience as a bartender.

18. Eldredge quit his employment at HPR, which he began June 22, on July 3, 1979. Stathis told Louis Corza, an HPR employee, that he needed a bartender. Corza, who is white, referred his friend Oscar Urteaga. Stathis hired Urteaga on July 6, 1979. Stathis knew nothing of Urteaga's experience. Stathis did not call the Union for referrals.

19. On July 30, 1979, Oscar Chavez was hired as a relief (vacation) bartender. He was not dispatched by the Union. There is no record of his filling out a HPR application.

20. In December 1979, bartender Urteaga quit to move to Hawaii. Stathis asked him if he knew a good bartender, and asked him to send his friend over. The friend, Claborn Newsome, was hired December 14, 1979. Newsome did not fill out an application. Stathis had not called the Union for referrals. Newsome is white.

21. HPR's practice in hiring bartenders at the time of the events described above was to attempt to hire a bartender referred by a current employee and only if that was unsuccessful to call the Union for referrals.

22. At no time since July, 1975, did the Union or its agents tell HPR that it could hire bartenders other than through Union referrals.

23. David Larkin, Charles Lee and Jeffrey Smith were each qualified to be hired bartenders.

24. HPR's reason for rejecting Lee and Smith — lack of stability shown by their applications — is not supported by the evidence.

25. Had HPR hired one of the qualified black bartenders who applied before Duane Eldredge was hired, that bartender would have earned the following in wages (at Union scale with two meal breaks and five meals) and estimated benefits and tips:

	1979 (June-Dec)	1980	1981	1982 (Jan-Dec) Sept
WAGES:	7,380	14,801	15,705	12,995
BENEFITS:	412	1,060	1,138	854
TIPS:	650	1,300	1,300	975
	8,442	17,161	18,143	14,824

26. Since June 19, 1979, the earnings of the three black bartenders have been:

	1979	1980	1981	1982
(June-Dec)				
LARKIN	-	12,704	4,434	-
LEE	586	4,057	4,239	-
SMITH	465	5,582	1,281	-

27. Between June, 1979 and the present, each of the three black bartenders has made substantial and sufficient efforts to mitigate his damages.

Rule 52(a), Fed. R. Civ. P. Compliance

Any of the foregoing findings of fact which should more properly be conclusions of law shall be considered conclusions of law.

II. *Conclusions of Law*

1. This Court has jurisdiction of this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e *et seq.*

2. The Commission established a *prima facie* case of disparate treatment of blacks by showing that (1) the three black bartenders were members of a racial minority who (2) applied for and were fully qualified for a job as a bartender at HPR, but (3) were denied the position while (4) defendant continued to seek applications from non-blacks with similar qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973); *Banty v. Barrows Corp.*, 660 F.2d 1327, 1330 (9th Cir. 1981).

3. HPR carried its burden of articulating "some legitimate, non-discriminatory reason for the employee's rejection" *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 1093 (1981).

4. HPR did not persuade the Court that it was actually motivated by the asserted non-discriminatory reason, but by producing sufficient admissible evidence of the asserted reason it raised a genuine issue of fact as to discrimination and returned the burden of persuasion to the Commission. *Texas Dept. of Community Affairs v. Burdine, Supra*, 101 S. Ct. at 1093-1094.

5. The Court concludes that the asserted legitimate reasons offered by HPR for rejecting the black bartenders were not in fact its true reasons, but were a pretext for discrimination. *Burdine, supra*, 101 S. Ct. 1093; see *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 804, 93 S. Ct. at 1825.

6. The Commission has carried the ultimate burden of persuading the Court that the black bartenders were the victims of intentional discrimination, both by proof that a discriminatory reason more likely motivated the employer and by showing that HPR's proferred reason is unworthy of credence. *Burdine, supra*, 101 S. Ct. at 1095.

7. The Court concludes, and infers from direct and circumstantial evidence, that HPR intentionally discriminated against the three black bartenders. *See Heagney v. University of Washington*, 642 F.2d 1157, 1163 (9th Cir. 1981).

8 The Court concludes further that the three black bartenders were rejected under circumstances which give rise to an inference of discrimination. *See Nanty v. Barrows Co., supra*, 660 F.2d at 1331.

9. Among the circumstances from which the Court infers discrimination is HPR's practice of attempting to recruit bartenders from referrals by incumbent employees, rather than from the Union. *See Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 729, fn.15 (5th Cir. 1976).

10. Other circumstances from which the Court infers discrimination are the total absence of blacks among the 30 persons employed by HPR as bartenders since 1965, and the fact that Gus Stathis hired no blacks for "front-of-the-house" positions between 1975 and 1980. *See O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 867 (9th Cir. 1982).

11. The Court concludes that HPR has not shown that hiring bartenders referred by incumbent employees is at all necessary to job performance. *De Laurier v. San Diego Unified School District*, 588 F.2d 674, 678 (9th Cir. 1978).

12. Having concluded that HPR has intentionally discriminated against blacks, the Court concludes that the Commission is entitled to relief in the form of back pay and an injunction requiring HPR to refrain from hiring and recruiting practices that operate to exclude blacks.

13. An injunction is appropriate even if the employer has made voluntary changes in its practices after the beginning of EEOC procedures. *Smith v. Union Oil Co.*, 17 FEP Cases 960, 997, 17 EPD para. 8411, p. 6177 (N.D. Cal. 1977).

14. The Court concludes that an award of back pay is appropriate pursuant to Section 706(g) of Title VII, 42 U.S.C., Section 2000e-5(g). *Kaplan v. IATSF*, 525 F.2d 1354, 1363 (9th Cir. 1975); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S. Ct. 2362 (1975).

15. The Court concludes that absent discrimination each one of the black bartenders could have been hired to fill HPR's June, 1979, vacancy.

16. Since it is not possible to determine which of the black bartenders should have filled the June, 1979, vacancy, one back pay award should be divided among all three. *Hill v. Western Electric Co.*, 13 FEP Cases, 1157, 1163 (E.D.Va. 1976) (para. 17), aff'd and rev'd on other grounds, 596F.2d 99 (4th Cir. 1979). *See also Hameed v. Int'l. Assn. Bridge, etc. Workers*, 637 F.2d 506, 520-521 (8th Cir. 1980).

17. The Court concludes that Larkin, Lee and Smith made adequate efforts to mitigate damages.

18. Interim earnings must be deducted from any back pay award. Section 706(g), 42 U.S.C. 2000e-5(g).

19. If interim employment is not permanent, interim earnings are deducted and liability for back pay resumes until permanent employment is found. *DiSalvo v. Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978).

20. The Court concludes that despite adequate efforts to find permanent employment, the three black bartenders did not find permanent employment after being discriminatorily rejected by HPR. Accordingly, a back pay award should cover the period from June 22, 1979, to the present.

21. The Court concludes that an award of back pay should be paid by HPR in an amount equal to the wages, benefits and tips that would have been earned by a bartender at HPR from June 22, 1979, to the present. From this should be deducted the interim earnings of the black bartender who earned the least in this period. *See Hill v. Western Electric Co., supra*, 13 FEP Cases at 1163. The resulting back pay award shall be divided among the three black bartenders, in inverse proportion to their interim earnings.

22. Plaintiff EEOC is entitled to recover its costs in this action.

Any of the foregoing conclusions of law which should more properly be considered findings of fact, shall be considered findings of fact.

Dated: April 14 - 1983

WILLIAM A. INGRAM
United States District Judge

Appendix D

Filed — April 26 - 1983
Court of Appeal — Northern District of California
WILLIAM L. WHITTAKER,
Clerk, U.S. District Court
Northern District of California

United States District Court
Northern District of California

Equal Employment
Opportunity Commission,

Plaintiff,

v.

House of Prime Rib,

Defendant.

No. C-81-1366-WAI

Stipulation to Correction of Finding of Fact
(Rule 60, F.R.C.P.)

Whereas Finding of Fact No. 25 of this Court's Findings of Facts and Conclusions of Law, dated April 14, 1983, is apparently based on Plaintiff's Exhibit No. 12 in this action; and whereas Plaintiff's Exhibit 12 computes earnings and benefits for January -September, 1982, while Finding No. 25 adopts the total amount of Exhibit 12 but attributes it to January - December, 1982,

Pursuant to Rule 60, Federal Rules of Civil Procedure, it is hereby stipulated and agreed by and between the undersigned counsel for the parties that Finding of Fact No. 25, page 6, may be corrected so that the right-hand column, presently headed:

1982
(Jan.-Dec.)

may be corrected as follows:

1982
(Jan.-Sep.)

Respectfully Submitted,

Dates: April 19 - 1983

MARIAN HALLEY
Attorney for Plaintiff,
Equal Employment
Opportunity Commission

Dated: April 20 - 1983

CHARLES O. MORGAN, JR.
Attorney for Defendant,
House of Prime Rib

SO ORDERED

Dated:

WILLIAM A. INGRAM
United States District Judge

Appendix E

Filed — July 19 - 1984
WILLIAM L. WHITTAKER,
Clerk, U.S. District Court
Northern District of California

United States Court of Appeals
for the Ninth Circuit

Equal Employment
Opportunity Commission,
Plaintiff-Appellee,

v.

House of Prime Rib,
Defendant-Appellant.

No. 83-2155
CV 81-1366-WAI

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Dated: May 14 - 1984

Appendix F

Filed — July 9 - 1984
PHILLIP B. WINBERRY,
Clerk, U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

Equal Employment
Opportunity Commission,
Plaintiff-Appellee,

v.

House of Prime Rib,
Defendant-Appellant.

No. 83-2155
CV 81-1366-WAI

(Northern District
of California)

ORDER

BEFORE: WISDOM*, ANDERSON, and SCHROEDER,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing.

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* Honorable John Minor Wisdom, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

No. 84-735

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOUSE OF PRIME RIB, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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No. 84-735

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Petitioner disputes the findings of the lower courts that it would have hired several black applicants in the absence of intentional discrimination, and that its actions — rather than those of the applicants' union — led to its failure to hire the applicants.

1. Petitioner is a restaurant in San Francisco. In June 1979, a bartender who had been employed by petitioner quit. Gus Stathis, petitioner's assistant manager, accordingly contacted Local 2 of the Hotel, Restaurant Employees & Bartenders Union (the Union) requesting referrals to replace the departing bartender.[1] Between June 14 and June

[1]Under its collective bargaining agreement with the Union, petitioner must notify the Union of any bartending vacancies and must consider all applicants referred to it by the Union. Only " 'if the Union is not able to provide competent help suitable for the position to be filled' may the employer hire persons not referred by the Union." Pet. App. C, Finding of Fact 8.

18, 1979, the Union referred three black applicants to petitioner. Pet. App. C, Findings of Fact 5, 10-16. Although each of these applicants had "substantial experience as a bartender" and was "qualified to be hired" (Pet. App. C, Findings of Fact 13-15, 23), all were rejected. Instead, Stathis contacted a former employee and solicited a referral from him. This referral, who was white, was hired on June 22, 1979. Stathis again used private referrals to find white replacements when the individual hired on June 22, and then his successor, left petitioner's employ. Pet. App. C, Findings of Fact 17-20.

In 1981, the Equal Employment Opportunity Commission (EEOC) brought suit against petitioner, alleging that it had violated Section 703(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)) by discriminating against the black bartenders. After a three-day trial, the district court found that, between 1965 and 1980, petitioner had employed at least 30 bartenders, none of whom was black. The court also concluded that Stathis had failed to hire any blacks to fill "front of the house" positions such as bartender, waitress or busboy, and had told the departing bartender in June 1979 — who left petitioner's employ to work at the Union — that he should not refer any blacks to fill his job. Pet. App. C, Findings of Fact 6, 7, 14.

Against this background, the court concluded that petitioner "intentionally discriminated against the three black bartenders" (Pet. App. C, Conclusion of Law 7). The court noted that each of the black applicants was qualified for the job, and that "absent discrimination each one * * * could have been hired to fill [petitioner's] June, 1979, vacancy." Each was denied the position, however, while petitioner "continued to seek applications from non-blacks with

similar qualifications." Pet. App. C, Conclusions of Law 15, 2.[2] Finally, the court found that petitioner's asserted reasons for declining to hire the black applicants "were a pretext for discrimination" (Pet. App. C, Conclusion of Law 5). The court therefore allocated a back pay award among the black applicants, and enjoined petitioner from discriminating against blacks in its future recruiting and hiring.[3]

The court of appeals affirmed in an unpublished opinion. (Pet. App. A). It concluded that the district court's finding of intentional discrimination "is amply supported by the record," adding that the black applicants were not required to prove that they were better qualified than the persons who eventually were hired because petitioner did not "compare[] the legitimate qualifications of a pool of applicants and select[] the better qualified" (*ibid.*). The court of appeals also rejected petitioner's argument that it was the Union that injured the black bartenders by failing to resubmit their names to petitioner. The court noted that petitioner could have requested the Union to refer any of the applicants, and held that each of the applicants adequately had attempted to mitigate his damages (*ibid.*).

2. Petitioner principally argues that the Commission failed to establish that the black applicants would have been hired in the absence of discrimination (Pet. 7-14). This contention is without merit and does not warrant further review.

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[2]There is no support whatsoever in the lower court findings for petitioner's assertion that the black applicants "were proven to be less qualified than the bartenders actually hired" (Pet. 21).

[3]Because the court was unable to determine which of the black applicants would have filled the vacancy in the absence of discrimination, it divided one back pay award among the three (Pet. App. C, Conclusion of Law 16). Petitioner has not challenged this method of allocation.

Read as a whole, the district court's opinion plainly establishes that petitioner would have employed one of the black bartenders had its hiring policy not been discriminatory. Thus, the court explained that each of the bartenders was qualified, that each "could" have been hired, and that one "should" have been hired. Pet. App. C, Finding of Fact 23; Conclusions of Law 15, 16. The court also found that all of petitioner's asserted reasons for rejecting the black applicants were pretexts for discrimination. Pet. App. C, Finding of Fact 24; Conclusions of Law 5, 6. Because the court found that each of the black applicants was qualified, and that each was rejected solely for discriminatory reasons, the obvious import of its conclusions is that one of the black applicants would have been hired absent petitioner's discrimination. In these circumstances, an award of back pay undoubtedly was proper. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-256 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).[4]

Given this background, petitioner is incorrect in arguing that the Commission could prevail only by establishing that the black applicants were better qualified than the white bartender who finally was hired. As the court of appeals noted, petitioner did not claim to have hired the white

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[4]Petitioner is incorrect in suggesting that there is disagreement among the circuits on this point (see Pet. 8). While the issue was once an open one in the Ninth Circuit (see *League of United Latin American Citizens* v. *City of Salinas Fire Department*, 654 F.2d 557, 558 (9th Cir. 1981)), it is now plain that both the District of Columbia and the Ninth Circuits permit the award of back pay only to Title VII claimants who would have been hired in the absence of discrimination. Compare, *e.g.*, *Day* v. *Mathews*, 530 F.2d 1083, 1084-1085 (D.C. Cir. 1976) with *Muntin* v. *California Parks & Recreation Department*, 671 F.2d 360, 363 (9th Cir. 1982). Given the district court's finding that discrimination led petitioner to refuse to hire the black bartenders, they would have recovered back pay in either circuit.

rather than the black applicants because it compared their applications and found that the former had superior qualifications. Cf. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 358 n.44 (1977). To the contrary, petitioner rejected the qualified blacks out-of-hand before soliciting an application from the white bartender who ultimately was hired. While an employer may of course "choose among equally qualified candidates," it may not base its choice "upon unlawful criteria." *Burdine,* 450 U.S. at 259. The record establishes that petitioner did precisely that in this case. Indeed, here, just as in *McDonnell Douglas Corp.,* the employer rejected qualified minority applicants in favor of leaving the position open and continuing to seek applicants of similar qualifications. See 411 U.S. at 802.

3. Petitioner also is incorrect in suggesting that its back pay liability should have been terminated by the Union's failure to refer the black applicants for employment a second time.[5] The record establishes that, after it rejected the black bartenders in June 1979, petitioner declined to call the Union for referrals (Pet. App. C, Findings of Fact 18-20); the lower courts also found that petitioner at any time could have requested the Union again to refer the three black applicants (Pet. App. A). In any event, petitioner has pointed to nothing in the record that would have led the Union to believe that petitioner was prepared to reconsider

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[5]Petitioner presumably means to suggest that the Union should have again referred the black bartenders when the white bartender who was hired on June 22, 1979, left petitioner's employ. To the extent that petitioner also intends to argue that the Union controlled petitioner's hiring practices (see Pet. 16), its contention is inconsistent with the record: the district court found that petitioner rejected the black applicants referred by the Union, and circumvented its collective bargaining agreement by consulting former employees rather than the Union to obtain the names of white applicants. See Pet. App. C, Findings of Fact 17-22.

applicants that it already had rejected. Thus it was properly found to have been petitioner's conduct, rather than that of the Union, that led to the injury here.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]Despite petitioner's argument to the contrary (Pet. 17-19), nothing in *Ford Motor Co.* v. *EEOC*, 458 U.S. 219 (1982), makes the award of back pay in this case inappropriate. *Ford* involved the effect on back pay liability of an employer's unconditional offer of employment to Title VII claimants. Petitioner made no such offer to the black bartenders — and both lower courts found that the applicants had made adequate attempts to mitigate their damages. Pet. App. A; Pet App. C, Conclusion of Law 17.

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